

UNITED STATES
v.
JAMES J. HELDMAN ET AL.

IBLA 73-263

Decided November 27, 1973

Appeal from decision of Administrative Law Judge Rudolph M. Steiner (South Dakota Contest Nos. M-1805 and M-1806) declaring mining claims null and void.

Affirmed.

Mining Claims: Discovery: Generally

A discovery exists where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

Mining Claims: Common Varieties of Minerals--Mining Claims:
Determination of Validity

To determine whether a deposit of building stone or other substance listed in section 3 of the Act of July 23, 1955, is of a common variety, the claimant must demonstrate that: (1) the mineral deposit has a unique property and (2) the unique property gives the deposit a distinct and special value. Possession of a unique property alone is not sufficient; there must be a comparison of the deposit under consideration with other deposits of similar materials. It must have some property which gives it value for purposes for which the other materials are not suited, or if the deposit

is to be used for the same purposes as other minerals of common occurrence, it must possess some property which gives it a special value for such uses which value is generally reflected by the fact that it commands a higher price in the market place.

Mining Claims: Discovery: Generally

The prudent man test of Castle v. Womble requires a showing that a reasonable prospect of success in developing a valuable mine exists. While there is room for consideration of future probabilities within this test, these probabilities cannot be based upon mere speculation. The crucial question to ask is whether, based on present fact, there is a reasonable prospect of success.

APPEARANCES: Appellant, James J. Heldman, pro se; Rogers M. Robinson, Esq., Office of the General Counsel, U.S. Department of Agriculture, for the appellee.

OPINION BY MR. RITVO

James J. Heldman has appealed to the Secretary of the Interior from a decision by Administrative Law Judge Rudolph M. Steiner, dated December 26, 1972, declaring appellant's White Monster, White Monster Nos. 1 and 2 and Ten Dike Nos. 1 and 2 lode mining claims null and void.

Appellant's White Monster lode mining claim was located on February 28, 1967. The White Monster Nos. 1 and 2 were both located on March 1, 1967. These three claims are situated in Lawrence County, South Dakota, within the Black Hills National Forest in sec. 24 and 25, T. 3 N., R. 3 E., Black Hills Meridian.

The Ten Dike claims were located on March 17, 1966. They are situated within the Black Hills National Forest in sec. 31, T. 1 S., R. 5 E., Black Hills Meridian, Pennington County, South Dakota.

In 1966, following a request by the Forest Service, United States Department of Agriculture, a contest was brought by the United States Bureau of Land Management to determine the validity of the above named mining claims. The Government's complaint charged that: (1) no valuable mineral deposit had been discovered within the limits

of the claims, (2) the lands within the limits of the mining claims were non-mineral in character, and (3) the quartz deposit within the exterior boundaries of the mining claims was a common variety of material.

Appellee's answer stated that the claims contained marketable quantities of pure white quartz, silver, graphite and gold. It further stated that the quartz on the claims exhibited a distinct and special property in that its purity allowed for usage in the manufacture of electronic devices. The answer also stated that Heldman was profitably marketing the quartz on his claims.

A prehearing conference was held on December 3, 1968, in Rapid City, South Dakota. Contestee Heldman was represented by counsel. Upon counsel's motion the hearings for the two groups of claims, White Monster and Ten Dike, were consolidated. It was conceded that the claims were located after July 23, 1955, and it was agreed that the only issues were: (1) whether a valuable mineral deposit existed on any of the claims, and (2) whether the quartz on the claims was of a common variety and therefore not locatable after July 23, 1955, under 30 U.S.C. § 611 et seq. The hearing was held in Rapid City, South Dakota, Rogers M. Robinson, Esq., appearing on behalf of the Contestant, and Charles E. Carrell, Esq., appearing for James J. Heldman. The hearing began on December 4, 1968, continued again on November 5 and 6, 1969, and was reopened and completed on June 7, 1972. 1/ Beginning November 5, 1969, Heldman appeared pro se.

During the hearing, Contestant's witnesses, including a geologist and an engineer, testified that there was no evidence of gold, silver or other valuable minerals on any of the claims. They further testified

1/ A number of reasons contributed to the exceptionally long period required to complete the hearing. The initial oral and documentary evidence on behalf of the contestant was introduced on December 4, 1968. At the conclusion of the first day's testimony it was agreed that the hearing should be continued to allow for a joint mineral examination. The transcript for this first day will be referred to hereafter as Tr. 1.

On November 5, 1969, following the joint mineral examination, the hearing was continued. All evidence for both sides was introduced and the hearing was concluded on the afternoon of November 6. The material from this hearing will be referred to as Tr. 2. Tr. 2 up to page 285 was not completely received by the Administrative Law Judge until December 14, 1971. This delay was caused, in part, by the fact that the court reporter moved from Rapid City to the West Coast, but mainly because the reporter suffered from ill health which developed after the hearing.

that the quartz on the claims had no unusual or unique qualities and was of widespread occurrence within the Black Hills area and in other states.

Heldman, the only witness for the Contestees, testified that he had been working the claims for a number of years and the operation was profitable. He stated that a major portion of the quartz was sold for technical uses, the remainder being sold for jewelry, building material and landscaping purposes. In Contestee's Answering Brief at 2, Contestee Heldman "withdrew any claims except that of snow-white quartz."

Based on a review of the entire record, the Administrative Law Judge found that the Contestee had failed to introduce any probative evidence demonstrating that gold, silver or other valuable minerals were on the claims or that the quartz deposits possessed any unique properties not found in other similar deposits of widespread occurrence. He also found that there was no probative or convincing evidence to support Heldman's testimony that a significant portion of the quartz was marketed for electrical or other uncommon uses. The quartz deposits were found to be of a common variety and used largely for building materials and landscaping purposes. Furthermore, it had not been shown that the quartz used for these purposes, purposes for which other minerals of widespread occurrence could be used, possessed any property imparting special value reflected by a higher market price.

As a result of the above findings, the Administrative Law Judge concluded: (1) the quartz on the claims was a common variety of stone within the meaning of the Act of July 23, 1955, 30 U.S.C. 611 (1970), 2/

fn.1 (Cont'd.)

On November 6, the tape recorder failed to record all of the testimony, and shorthand notes were not available. Given this unfortunate state of affairs, the Administrative Law Judge reopened the hearing on June 7, 1972, to obtain rebuttal evidence which was not included in the available records for the reasons indicated. The transcript representing this hearing will be referred to as Tr. 3.

2/ Section 3 of the Act of July 23, 1955, provides in pertinent part that:

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws * * *. "Common

and (2) the quartz was not a valuable mineral deposit subject to location under the mining laws of the United States. Consequently, the mining claims were declared null and void.

On appeal, appellant asserts that the evidence in the record does not support either of the above two major conclusions of the decision. We do not agree.

Appellant contends that his particular quartz deposit has the distinct and special property of being pure white in coloration, large in size and uniform in quality, enabling it to command a higher price in the market place for building material and decorative use as compared with other common varieties of quartz. Appellant additionally argues that the pure, iron-free quality of the quartz makes it commercially valuable for uncommon usage in the manufacturing of electronic devices. Heldman does concede in his brief that the quartz has not been marketed for this technical use in the past. Nevertheless, he contends that with sufficient capital in his control he can market the quartz for technical use in the future. Given both these profitable markets, appellant argues that he has a valuable discovery on his claims.

Under the mining laws of the United States, 30 U.S.C. 64 ed., §§ 21 et seq., only valuable mineral deposits may be located. In United States v. California Soyland Products, Inc., 5 IBLA 179, 188, (1972), we stated:

* * * For a mining claim to be valid there must be discovered on the claim a valuable mineral deposit. A discovery exists

* * * [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * * Castle v. Womble, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 599 (1968).

fn. 2 (Cont'd.)

varieties" as used in sections 601, 603, and 611 to 615 of this title does not include deposits of such minerals which are valuable because the deposit has some property giving it distinct and special value * *

This test, the prudent man rule, has been refined to require a showing that the mineral in question can be extracted, removed and presently marketed at a profit, the so-called marketability test. United States v. Coleman, *supra*. * * *

There is sufficient evidence in the record to establish that Heldman was realizing profits from his mining venture. The Government's first witness, Robert G. Gnam, a mineral examiner for the United States Forest Service, testified that between his 1967 and 1972 visits to the disputed claims, work was done on the major cuts. He estimated that approximately 1,400 tons of material had been removed during the intervening period. According to appellant's records and testimony, hundreds of tons of white quartz had been profitably marketed from the claims.

Mere proof of marketability, however, is not sufficient to satisfy the requirements of Section 3 of the Act of July 23, 1955. In United States v. Dezan, A-30515, p. 7 (July 1, 1968) the Department interpreted Section 3 of the Act:

* * * [as] requiring a deposit of an uncommon variety of sand, stone, etc., to meet two criteria: (1) that the deposits have a unique property and (2) that the unique property give the deposit a distinct and special value. Possession of a unique property alone is not sufficient. In applying these criteria, the Department has held, there must be a comparison of the deposit under consideration with other deposits of similar materials. It must have some property which gives it value for purposes for which the other materials are not suited, or if the deposit is to be used for the same purposes as other minerals of common occurrence, it must possess some property which gives it a special value for such uses which value is reflected by the fact that it commands a higher price in the market place.

With respect to criteria (1), appellant alleges that his quartz deposit has the unique property of being pure white, large and uniform in quality. This allegation was rebutted by the Government's witnesses. Gnam testified that he had on numerous occasions examined the claims in question and that the quartz deposits examined were of common occurrence in the Black Hills region. He further testified that he had seen similar white quartz deposits in Colorado and Wyoming and that the quartz deposit at issue had no unusual or unique qualities. Amos F. Kline, Jr., a geologist with the United States Forest Service, testified that he examined the claims,

took samples, and could not find any appreciable difference between the quartz on the Ten Dike and White Monster claims and the rather numerous other quartz mines and stockpiles he had examined in the area.

Upon review of the complete record, we find that the quartz deposit on appellant's claims has no unique, physical characteristics. Nevertheless, it is worth taking note that even assuming the quartz in question was unique, that alone would not be enough. In the Dezan case, supra, the Department set out a two step test. The second step, "* * * that the unique property give the deposit a distinct and special value," has also not been satisfied by the appellant.

If the quartz is to be used for the same purposes as minerals of common occurrence, then there must be a showing that the unique property of the quartz gives it a special value for such use. Such value would normally be reflected by the fact that the quartz would command a higher price in the market place in comparison with the price for which quartz from other deposits without such unique property is sold. United States v. United States Minerals Development Corporation, 75 I.D. 127, 134 (1968); United States v. Dezan, supra; United States v. California Soyloid Products, supra at 184.

The quartz from appellant's claims was used primarily in decorative, landscaping and precast work. Appellant's selling price was generally around \$20 per ton. (Answer to Complaint.) No evidence was brought forth by appellant demonstrating that this price was competitively higher than prices for other common varieties of quartz. In fact, there was testimony that the \$20 per ton price represented a figure below the competitive price and resulted in an unprofitable operation during a period when appellant entered into a joint venture in an attempt to capture a greater share of the sales market. Tr. 11.

At best, then, the record indicates that when the quartz was used for the same purposes as other minerals of common occurrence, it could be marketed profitably at competitive prices. Appellant did not present any persuasive evidence that the quartz had any unique properties giving it a special and distinct value for use as decorative, landscaping, in precast panels, or other common purpose which enabled the quartz to command a higher than normal price in the market place.

Appellant attempts to escape the above dilemma by arguing that he has met the requirements of section 3 of the Act, supra, given the special quality of his quartz which makes it useful for a purpose for which other commonly available materials cannot be

used; namely, for use in the electrical industry. While appellant concedes that he is not presently marketing the quartz for this technical use, he argues that he will be able to do so once he can afford to process the quartz on a large enough scale. Appellant testified:

* * * [t]he intended purposes of the quartz so located is for peizo-electric properties. However, I attempted to sell all the quartz by the cheapest methods to make a profit so that I could build a quartz reduction floatation mill. I could then realize premium profits from the entire quartz deposit.

(Tr 3-64.)

Appellant's argument does not explain why other businesses, already functioning at an efficient scale, were not purchasing appellant's "unique" quartz for this uncommon usage. Appellant had ample opportunity to establish the marketability of the quartz for uncommon variety purposes. Having failed to demonstrate that others could presently use the quartz for technical use, appellant moves ahead with a speculative and remote contention that at some indefinite time in the future the quartz will be mined and sold for technical use. Such speculation standing alone, must be rejected.

The prudent man test of Castle v. Womble, supra, requires a showing that a reasonable prospect of success in developing a valuable mine exists. While there is room for consideration of future probabilities within this test, these probabilities cannot be based upon mere speculation. The crucial question to ask is whether, based on present fact, there is a reasonable prospect of success. Castle v. Womble, supra, at 475; United States v. Denison, 76 I.D. 233, 240 (1969). Given the present facts at hand, appellant has not demonstrated a reasonable prospect of successfully exploiting the quartz for the alleged technical usage.

Accordingly, the Board has determined that the quartz deposits on appellant's claims are a common variety of stone within the meaning of the Act of July 23, 1955, and are not valuable mineral deposits subject to location under the mining laws of the United States. 3/

3/ Insofar as the claims are alleged to be a valuable deposit of building stone, they would be invalid for another reason. Lands chiefly valuable for building stone may be located only as placer claims. 30 U.S.C. § 161 (1970). Apparently these claims were all located

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision holding the claims null and void is affirmed.

Martin Ritvo, Member

We concur:

Joseph W. Goss, Member

Anne Poindexter Lewis, Member

fn. 3 (Cont'd.)

as lode claims. If a claim contains no other material than building stone it cannot be located as a lode and if it is so located, it would be invalid for that reason. United States v. Cascade Building Stone, 8 IBLA 447 (1972).

